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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	**CC Docket No. 96-149**
	)	
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To: The Commission

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel") submits the following comments in response to the Commission's *April 3 Public Notice*[1/] in the above-captioned matter.[2/]

I. INTRODUCTION

CompTel and its members were active participants in the legislative process which culminated in the passage of the Telecommunications Act of 1996 (the "'96 Act"). As competitive companies, CompTel's members are vitally affected by the prices, terms and conditions which apply to the bottleneck services which they must purchase from the Regional Bell Operating Companies ("RBOCs") and which govern the RBOCs' entry into competitive

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1/ Public Notice, CC Docket No. 96-149, DA 97-666, April 3, 1997.

2/ CompTel is the leading trade association of the competitive telecommunications industry. It includes among its members more than 200 providers of competitive telecommunications services.

markets. Because the CompTel member companies must both purchase from and compete with the RBOCs, they have a vital stake in the safeguards at issue in this proceeding.

Sections 271 and 272 are at the heart of the '96 Act and, consequently, were among the most contentious aspects of the legislative process. The RBOCs adamantly sought an early end to the interLATA restrictions of the modified final judgment ("MFJ"). They argued for immediate entry into the interLATA marketplace.

The competitive carriers opposed an immediate removal of the interLATA prohibition and proposed entry only upon the FCC's finding that actual competition was present. The competitive companies also requested safeguards against RBOC anticompetitive conduct; these protections were to continue until they were no longer necessary.

The end product of this debate — Sections 271 and 272 — represents a compromise between these positions. The RBOCs were given immediate interLATA entry into areas where they were believed by Congress to lack market power. These include out-of-region services, incidental interLATA services and previously authorized services. "In region" interLATA services, other than exchange access services, remain barred until the FCC concludes that entry is permissible pursuant to the criteria contained in Section 271.

Even then, however, the phase-in of in-region interLATA services is not complete. Immediately upon receiving FCC authorization for in-region interLATA services, and for at least three years thereafter, the RBOCs must undertake their interLATA activities through a structurally separate affiliate. This transition period is meant to ensure that, during the ongoing transition to local competition, special precautions are taken to prevent RBOC discrimination and cost misallocation. At the end of the transition period, the separate affiliate requirement

expires. In this way, the Congress crafted the '96 Act to balance the interests and claims of the RBOCs against those of the competitive telecommunications companies.

Specifically, the '96 Act established Section 271 as the vehicle governing RBOC interLATA services; indeed, Section 271 is entitled "Bell Operating Company Entry Into InterLATA services." Section 271 has 10 subsections which fully define the scope of permissible and impermissible conduct for the RBOCs in interLATA services and establish the procedures for RBOC entry.

Section 272 is entitled "Separate Affiliate; Safeguards". It governs the manner in which RBOCs may provide interLATA services after being authorized by the FCC to do so pursuant to Section 271.

Some of the RBOCs now seek to rebalance this Congressional compromise. They contend that a phrase in subsection 272(e)(4) preserving the RBOCs' ability to serve their interLATA affiliates in the same manner as other competitors is actually a wholesale abandonment of the separate affiliate scheme of Section 272 except insofar as the provision of retail services is involved.

Subsection 272(e) is entitled "Fulfillment of Certain Requests." It states four principles for provision of service by an RBOC to its interLATA affiliate: (1) the timing of RBOC fulfillment of exchange and exchange access services must not discriminate against competitors; (2) an RBOC's provision of facilities, services and information to its affiliate must not favor its affiliate; (3) an RBOC must not charge itself or its affiliate any less for exchange or exchange access services than it charges others; and (4) an RBOC "may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities

are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated." 47 U.S.C. § 272(e)(4).

Taken in the context of Sections 271 and 272 as a whole, it is "clear as sunlight" that subsection 272(e)(4) is *not* a grant of authority to the RBOCs; rather, this provision simply indicates that any service *which the RBOC is allowed to provide directly* may be purchased by its affiliate in the same manner as unaffiliated competitors. Subsection 272(e)(4) is meant to help the RBOCs by making it clear that the preceding three elements of subsection 272(e) should not be read as a prohibition on the RBOC affiliates' purchase of any service which their parent companies offer. Thus, the mandate of subsection 272(e)(4) is to define the scope of the restrictions on the relationship between an RBOC and its affiliate, *not* to create an affirmative authorization for the parent company. The RBOCs' proposed reading -- that this subsection negates the entire scheme of structural separation and permits the RBOC to provide wholesale interLATA services directly -- is nonsensical. By this claim, the RBOCs are attempting to take a minor statutory provision meant to clarify the scope of their nondiscrimination obligations and use it to rewrite the entire scheme embodied in Sections 271 and 272.

The Commission correctly analyzed this portion of the '96 Act in the *First Report and Order* in this proceeding. Further analysis of the questions posed in the *April 3 Public Notice* makes the accuracy of this determination even more apparent.

II. RESPONSE TO SPECIFIC QUESTIONS

1. Meaning of "Originate"

The overall scheme of Sections 271 and 272 is broad, not narrow. These provisions establish an initial outright ban on RBOC in-region interLATA services, a Commission review

process to permit entry when appropriate, and a transition period thereafter to ensure proper enforcement of safeguards. Nowhere does the statute or its legislative history indicate that the only prohibition imposed by these Sections is on the retail marketing of interLATA services to end users. The RBOC definition of "origination" of traffic would completely revise the delicate compromise embodied by Sections 271 and 272 and tilt the transition plan dramatically in favor of the RBOCs.

One of the most telling flaws in the RBOCs' position is the illogical result which it reaches. Subsection 271(b)(1) defines forbidden "in region" services as those "originating in any of [an RBOC's] in-region States." The RBOCs' logic would narrow the scope of this prohibition to retail services by defining "origination" to exclude wholesale offerings. Under this definition of "origination" then, the RBOCs would be authorized to provide wholesale inter-LATA services today, just as they are permitted to offer out-of-region and incidental services. According to the logic of this view, the RBOCs were authorized to provide wholesale inter-LATA services immediately, but this fact was not expressly mentioned by the statute or its legislative history.

This claim is too far-fetched even for the RBOCs, however. Instead, they concede that they are barred from in-region interLATA services until authorized by the FCC pursuant to Section 271. At that time, however, their definition of "origination" would conclude that the structural separation requirement applies only to retail sales. All construction, network management and other functions could be undertaken directly by the RBOC under this view.

Unfortunately for the RBOC position, nothing in the statute suggests that the definition of "origination" is transformed during the FCC Section 271 review process. If in-region "origination" is limited to retail offerings *after* FCC approval, it is necessarily so limited

before. And if that is so, then the RBOCs may provide wholesale interLATA services today. While the RBOCs concede that this is not the case, their concession is made merely to mask the inherent flaw in the logic of their contention. The ban on RBOC "origination" of in-region interLATA services is not limited to retail offerings today and the Section 271 review process will not redefine the word "originate" to permit such activity later.

2. "IntraLATA" Services in Section 272(e)(4)

That subsection 272(e)(4) does not represent an independent grant of operating authority also is made clear by the statement in Section 271(a) that no RBOC or RBOC affiliate "may provide interLATA services except as provided in *this section*," *i.e.*, section 271. Since subsection 272(e)(4) is outside the scope of Section 271, it cannot be read to authorize inter-LATA services.

Similarly, the inclusion of intraLATA services within subsection 272(e)(4) supports the view that no independent grant of authority for interLATA services is intended by that subsection. By referencing both interLATA and intraLATA offerings, the subsection makes clear its reference is to "any" service *which the RBOC is otherwise authorized to provide*. This language makes plain that no independent grant of authority is intended by subsection 272(e)(4). Clearly, subsection 272(e)(4) is meant to state what the other portions of subsection 272(e) do *not* do (prohibit an RBOC affiliate from purchasing any service which its parent offers), and not to redefine the types of service which the RBOC may offer directly (in-region interLATA services). Thus, *intraLATA* offerings were included along with interLATA in the language of subsection 272(e)(4).

3. Discrimination and Cost Misallocation

As described above, Sections 271 and 272 represent a compromise which balances the interest of the RBOCs in interLATA entry against the concerns of competitors about anti-competitive conduct. The plan that was enacted for RBOC in-region services involves a three step process: (1) a prohibition until FCC approval is obtained, (2) structural separation of interLATA services during a transition period, and (3) thereafter, full participation.

This scheme rests upon the twin assumptions that the possible risks of discrimination and cost misallocation will be manageable if the FCC is able to make the findings required to authorize in-region services and that application of the structural separation requirements and other safeguards for the transition period will be adequate protection against those risks. The RBOC reinterpretation of subsection 272(e)(4) would radically revise this carefully balanced compromise.

The premise underlying Sections 271 and 272 is that, for a three year period after entry (or longer if extended by the FCC), an RBOC "may not provide any [interLATA] service" unless it does so through an affiliate "separate from any operating company entity that is subject to the requirements" of Section 251(c). The scope of this separation is defined by subsection 272(b)(1), which requires, among other things, that the affiliate "operate independently" from its RBOC parent.

This independent operation is critical to the effectiveness of the structural separation requirement and to the success of the statutory plan to protect against discrimination and anticompetitive cost allocation. If the RBOC argument on subsection 272(e)(4) is accepted, then the only "independent operation" required of the RBOCs' interLATA affiliate will be retail marketing. All other aspects of interLATA service, network design and procurement,

construction of operational support systems and so on, will be conducted directly by the RBOC. Thus, the "independent" affiliate would have no control over its own network design, location, equipment, or any other of the key elements. Rather, it would simply retail whatever its RBOC parent provides. Not only is this not "independent operation," but this approach heightens the potential for discrimination and cost misallocation by several orders of magnitude over that which is present where meaningful separation is required.

This approach represents both a radical departure from the intent of the law and poor public policy. Allowing the major interLATA investment decisions and financing to be lodged in the RBOC, rather than the separate affiliate, would make the policing of cross-subsidy and discrimination virtually impossible. In the process, this approach also would eliminate subsection 272(b)(4) as a meaningful separation provision by allowing all the significant financial decisions and commitments to be made by the RBOC directly.

4. Type of Service

As a practical matter, the type of interLATA service provided by an RBOC to its affiliate (*e.g.*, end-to-end vs POP-to-POP) is important because some offerings are easier to use for discriminatory purposes than others. From a legal perspective, however, all in-region inter-LATA services are the same -- during the transition period they must be "provided" (in every sense of the word) through a separate affiliate.

CONCLUSION

The Commission was correct in concluding in the *First Report and Order* in this docket that subsection 272(e)(4) does not authorize the RBOCs to provide in-region interLATA services on a wholesale basis. Subsection 272(e)(4) permits the RBOCs to sell authorized

services to their interLATA affiliates, but it does not expand the scope of their authorized services. The RBOC reading of the statute is far beyond the law's intent and represents an abandonment of the safeguards contemplated by the Congress. Certainly, if the Congress intended the structural separation to apply only to retail operations, it would have done so clearly and directly.

The Commission should reject the RBOC contentions and reaffirm its prior conclusions. Moreover, pending final judicial review of this matter, the Commission should deny any RBOC applications for in-region interLATA authority under Section 271. The "public interest" review of Section 271 will be dramatically altered if the Court accepts the RBOC view and Section 271 approval immediately opens wholesale interLATA services, with its accompanying network construction and investment, to the RBOCs without structural separation. Until the Commission receives clarity from the courts on this issue, it cannot conclude that RBOC in-region interLATA services are in the public interest.

Respectfully submitted,

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